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IN THE

Supreme Court of the United States

October Term, 1962

No. 11

JOHN THOMAS AVENT, *et al.*,

Petitioners,

—v.—

NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONERS

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NORTH CAROLINA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF FOR PETITIONERS

Opinion Below

The opinion of the Supreme Court of North Carolina (R. 73) is reported at 253 N. C. 580, 118 S. E. 2d 47 (1961).

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered January 20, 1961 (R. 90). On April 4, 1961, time for filing a petition for writ of certiorari was extended by the Chief Justice to and including May 4, 1961 (R. 91). The petition was filed on that date. June 25, 1962, the petition for writ of certiorari was granted (R. 92). Jurisdiction of this Court is invoked pursuant to Title 28 United States Code Section 1257(3), petitioners having asserted below

and claiming here denial of rights, privileges, and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Constitutional and Statutory Provisions Involved

1. This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. This case also involves North Carolina General Statutes, §14-134:

> Trespass on land after being forbidden. If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars or imprisoned not more than thirty days.

Questions Presented

Petitioners have been arrested, convicted, and sentenced to prison for refusal to obey an order to leave the lunch counter in a store open to the public, including Negroes. This order was given to enforce a custom of the community, generated by a massive body of state segregation law. The premises are extensively licensed and regulated by the State of North Carolina and the City of Durham. North Carolina has failed to accord Negroes the right of equal access to public accommodations.

I.

A. May North Carolina, compatibly with the Fourteenth Amendment, make petitioners the target of a prosecution under its trespass laws when the articulated rationale of

the prosecution is, according to North Carolina's highest court, to enforce "the clear legal right of racial discrimination" of the S. H. Kress Corporation?

B. Are not these criminal trespass prosecutions, in any event, incompatible with the Fourteenth Amendment because they constitute purposeful state enforcement of a custom of racial discrimination—a custom which is itself the carefully nurtured fruit of decades of segregation required by state law?

C. Is not the degree of supervision and control which the State of North Carolina and the City of Durham exercise over the S. H. Kress lunch counter business so extensive a form of state involvement that, given the circumstances of A and B, *supra*, North Carolina has failed in its obligation to afford equal protection of the laws?

D. In addition to considerations set forth above, is not the property right which S. H. Kress and Co. has asserted —the right to discriminate racially in a single portion of a store open to the general public—so inconsequential to the main core of its proprietary interest, that the State may not compatibly with the Fourteenth Amendment, enforce that right by its criminal laws?

E. In view of the fact that North Carolina denies protection to Negroes against racial discrimination in public accommodations, do not the circumstances set forth above establish a denial of equal protection of the laws?

II.

The trespass statute under which petitioners were convicted forbids only entry without license. Petitioners were invited to do business in the store and were ordered to

leave only because they sought nonsegregated service at the lunch counter, the only racially segregated counter in the store. The North Carolina Supreme Court has for the first time unambiguously held that the statute under which petitioners were convicted makes criminal refusal to leave after an invitation to enter. Does not this conviction, therefore, violate the due process clause of the Fourteenth Amendment in that the statute upon which it rests gave petitioners no fair and effective warning that their actions were prohibited?

III.

Is not North Carolina denying petitioners freedom of speech secured by the Fourteenth Amendment by using its criminal trespass laws as a device to stop petitioners from urging S. H. Kress and Company to abandon its discrimination practices?

Statement

Petitioners, five Negro students from North Carolina College and two white Duke University students, were arrested for a "sit-in" demonstration at the S. H. Kress Department store lunch counter in Durham, North Carolina (R. 20-21). They were charged with trespass under North Carolina General Statutes, Chapter 14, Section 134, which prohibits going or entering upon land after being forbidden to do so (R. 1-10).

On May 6, 1960, petitioners, some of whom in the past had been regular customers, bought small stationery items at counters on the first floor of the Kress Department Store (R. 35, 39, 41-43, 46, 47, 48). Negroes and whites were served without discrimination in all fifty departments ex-

cept at the lunch counter portion where patrons sit (R. 22-23). There Negroes were barred although a "stand-up" section serviced whites and Negroes together (R. 22-23). After making their purchases, petitioners proceeded to the basement through the normal passageway bordered by an iron railing, and took seats at the lunch counter (R. 37, 40, 42, 44, 46, 47, 48). No signs at any entranceway or counter barred or limited Negro patronage (R. 22-23). A sign in the basement luncheonette limited it to "Invited Guests and Employees Only" (R. 23). No further writing elucidated its meaning; but the manager testified that while invitations were not sent out, white persons automatically were considered guests, but Negroes and whites accompanied by them were not (R. 22).

The racial distinction was based solely on the custom of the community: The manager testified, "It is the policy of our store to wait on customers dependent upon the custom of the community . . . It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs 'Invited Guests and Employees Only'" (R. 23). He further stated that if Negroes wanted service, they might obtain it at the back of the store or at a stand-up counter upstairs (R. 22).

As petitioners took seats, the manager approached and asked them to leave (R. 21). One petitioner, Joan Nelson Trumpower, a white student, had already received and paid for an order of food (R. 42). When she attempted to share it with Negroes on either side of her, the manager asked her to leave (R. 23, 42). He never identified himself, however, as the manager or as a person with authority to ask them to leave (R. 42).

While petitioners remained seated awaiting service, the manager called the police to enforce his demand (R. 21).

An officer promptly arrived and asked them to leave (R. 21). Upon refusal the officer arrested them for trespass (R. 21). At all times petitioners were orderly and, when arrested, offered no resistance (R. 22, 26).

Petitioners were members of an informal student group with a program of protesting segregation (R. 36, 41, 43, 44). They had organized and led picketing at the store to protest its policy of fully accepting the business of Negro patrons while refusing them service at the sit-down lunch counter (R. 36, 40-41, 44-45). The picketing occurred at various times from February 1960 until the arrest on May 6, 1960 (R. 44). Some of the petitioners had requested and had been denied service on previous occasions at the lunch counter, and on the day of the arrests, they continued to request service in hope that their protests would be successful (R. 37, 40-41, 49). On the previous day petitioners attended a meeting to discuss the sit-in demonstrations, where it was agreed that they would trade in the store as customers as in the past, and then seek service on the same equal basis at the lunch counter (R. 49).

They were indicted for trespass in the Superior Court of Durham County, the indictments stating that each petitioner

> "with force and arms . . . did unlawfully, willfully, and intentionally, after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co., store . . . said S. H. Kress and Co., owner being then and there in actual and peaceable possession of said premises under the control of its manager and agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said defendant after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress

> and Co., to leave that part to the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that . . . [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state."

Each indictment identified each petitioner as "CM" (colored male), "WM" (white male), "CF" (colored female), or "WF" (white female) (R. 2, 3, 5, 6, 7, 9, 10). Petitioners made motions to quash the indictments raising defenses under the Fourteenth Amendment to the United States Constitution. These were denied (R. 11-15). To the indictments they entered pleas of not guilty (R. 15).

Various federal constitutional defenses were made throughout and at the close of trial, but were overruled (R. 12, 15, 26-34, 50, 66-67). Petitioners were found guilty (R. 15-16). Petitioners Coleman, Phillips, and Callis Napolis Brown were sentenced to 30 days imprisonment in the common jail of Durham County to work under the supervision of the State Prison Department (R. 17-18). Petitioner Streeter was sentenced similarly to 20 days (R. 19). Petitioner Avent was sentenced to 15 days in the Durham County jail (R. 16). Prayer for judgment was continued in the cases of Shirley Mae Brown and Joan Harris Nelson Trumpower (R. 16, 17).

Error was assigned again raising and preserving federal constitutional defenses (R. 67-69), and the case was heard by the Supreme Court of North Carolina, which affirmed the convictions on January 20, 1961 (Clerk's Certificate following Court's Opinion).

Summary of Argument

I.

The court below held that it was enforcing "the clear legal right of racial discrimination of the owner." But, while in some circumstances there may be a personal privilege to make racial distinctions, its limit is reached when the person exercising it turns to the state for assistance. Judicial and police action are no less forbidden State action when invoked to enforce discrimination initiated by an individual. Any suggestion that private rights, in the sense that they invoke considerations of privacy, are involved is farfetched. Kress's has been open to the public in general. The management did not assert the corporation's own preference for a segregation policy, but rather the custom of the community. While considerations of privacy may be meaningful in determining the reach of some constitutional liberties, in this case the right to freedom from State imposed racial discrimination is not in competition with any interest the State might have in protecting privacy.

At the very least, however, the State may not enforce racial discrimination which expresses deep-rooted public policy. The record here conclusively shows that this is what happened in this case. Such customs are a form of State action. But beyond this the segregation customs in this case were generated by a host of State segregation laws. The North Carolina Advisory Committee to the United States Commission on Civil Rights has concluded that, "so long as these compulsory statutes are on the books, some private citizens are more than likely to take it upon themselves to try to enforce segregation." Scholarship establishes the crucial role which government, politics, and law have played in creating segregation customs.

But the State-enforced, State-created community custom of segregation in this case is even more invidious because it has taken place in an establishment in which the State has been deeply involved by requiring extensive licensing and regulation. State involvement in such an enterprise precludes State enforcement of segregation therein by means of arrests and prosecutions for trespass.

The holding below that the State merely was in a neutral fashion enforcing an inalienable, sacred, property right is clearly incorrect. States can, and have, constitutionally forbidden property owners to discriminate on the basis of race in public accommodations. North Carolina has not inhibited itself from requiring racial segregation on private property. The more an owner for his advantage opens his property for use by the public in general, the more do his rights become circumscribed by the constitutional and statutory rights of those who use it.

Property is a bundle of rights and privileges granted by the State. That portion of the rights which constitute Kress's property, which Kress asserts here, and which the State has enforced is to control the conduct and association of others. This type of property right historically has never been unrestrained throughout the whole range of efforts to assert it. Restraints on that power are but a manifestation of the fact that law regularly limits or shapes property rights where they may have harmful public consequences. Other characteristics of the asserted right to racially discriminate in this case are that no claim of privacy has been intruded upon; that petitioners sought only to use the premises for their intended function; that segregation was required only in a single part of an establishment open to the general public, to which petitioners were admitted and in which they were invited to trade freely except at the lunch counter in question. This separable sliver in the entire

complex of powers and privileges which constitutes Kress's property is hardly entitled to legal protection when it collides with the Equal Protection Clause of the Fourteenth Amendment, whose purpose was an end of discrimination against the Negro.

Moreover, the *Civil Rights Cases* assumed that the State law provided "a right to enjoy equal accommodations and privileges . . . one of the essential rights of the citizen which no state can interfere with." The failure to provide such rights can deny the equal protection of the laws. One member of the Court which decided the *Civil Rights Cases* previously had written that denial included omission to protect as well as the omission to pass laws for protection. Legislators concerned with the scope of the Fourteenth Amendment expressed similar views. The *Civil Rights Cases* were decided on the assumption that the States in question protected those rights. It is doubtful that the result would have been the same if then, as today in North Carolina, the States actively interfered with the right of equal access to public facilities. No State may abdicate its responsibilities by ignoring them; and where a State by its inaction has made itself a party to the refusal of service and has placed its power and prestige behind discrimination, convictions such as those obtained in this case must fall.

II.

The statute applied to convict petitioners was unreasonably vague and thereby offends the due process clause of the Fourteenth Amendment in that although the statute, by terms, prohibits only the act of going on the land of another *after* being forbidden to do so, the court below has expansively construed the law to cover petitioners' act of remaining on the property after being directed to leave. This strained construction of the plain words of the law

converts the common English word "enter" into a word of art meaning "trespass" or "remain" and transforms the statute from one which fairly warns against one act into a law which fails to warn of conduct prohibited. The law is invalid as its general terms do not represent a clear legislative determination to cover the specific conduct of petitioners, which is required where laws deter the exercise of constitutional rights.

III.

The conviction violates petitioners' right to freedom of expression as secured by the due process clause of the Fourteenth Amendment against state infringement. Petitioners' action here, a sit-in, is a well recognized form of protest and was entirely appropriate to the circumstances, including the use to which the privately owned property involved had been dedicated by the owner. There were no speeches, picket signs, handbills, or other forms of expression which might possibly be inappropriate to the time and place. There was merely a request to be permitted to purchase goods in the place provided for such purchases. The expression was not in such circumstances or of such a nature as to create a clear and present danger of any substantive evil the State had a right to prevent. The arrests improperly stifled a protest against racial discrimination.

ARGUMENT

I.

North Carolina in Enforcing What Its Highest Court Has Denominated a "Clear Legal Right of Racial Discrimination" Has Denied to Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

A. Arrest, Conviction, and Sentence to Prison for Trespass for Having Violated the S. H. Kress Co.'s Requirement of Racial Segregation at Its Public Lunch Counter Deny Petitioners the Equal Protection of the Laws Secured by the Fourteenth Amendment.

In affirming the conviction below the North Carolina Supreme Court has twice said that it was merely enforcing "the clear legal right of racial discrimination of the owner" (R. 82, 83). One need turn no further than to *Shelley* v. *Kraemer*, 334 U. S. 1, to see that it has been plain—if any constitutional doctrine can be called plain—that there is no "clear legal right of racial discrimination." To the contrary, while in some circumstances there may be a personal privilege of making racial distinctions, the limit of that privilege certainly is reached when the person exercising it turns to state instrumentalities for assistance. Racial discrimination is constitutionally inadmissible when "the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.[1]

[1] Segregation has been forbidden in schools, *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1; parks and recreational facilities, *Mayor, etc. of Baltimore* v. *Dawson*, 350 U. S. 877; *Holmes* v. *Atlanta*, 350 U. S. 879; *New Orleans City Park Improvement Ass'n* v. *Detiege*, 358 U. S. 54; and airports, *Turner*

"[I]t has never been suggested that state court action is immunized from the operation of [the Fourteenth Amendment] . . . simply because the act is that of the judicial branch of the state government." *Shelley* v. *Kraemer*, 334 U. S. at 18. See also *Barrows* v. *Jackson*, 346 U.S. 249; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 499, 463. Police action which segregates denies Fourteenth Amendment rights. *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 533 n. 1 (5th Cir. 1960); see also *Monroe* v. *Pape*, 365 U. S. 167; *Screws* v. *United States*, 325 U. S. 91. "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a prior agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions

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v. *Memphis*, 369 U. S. 350; *Henry* v. *Greenville Airport Comm'n*, 284 F. 2d 631 (4th Cir. 1960).

Segregation requirements have been prohibited in privately sponsored athletic contests, *State Athletic Comm'n* v. *Dorsey*, 359 U. S. 533; and in connection with privately owned transportation facilities, *Gayle* v. *Browder*, 352 U. S. 903; *Evers* v. *Dwyer*, 358 U. S. 202; *Bailey* v. *Patterson*, 369 U. S. 31; *Taylor* v. *Louisiana*, 370 U. S. 154; *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (5th Cir. 1960). A State law construed to authorize discrimination by privately owned restaurants was thought to be "clearly violative of the Fourteenth Amendment" by Mr. Justice Stewart, concurring in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 727. Three dissenting Justices agreed this would follow if that were a proper construction of the law, 365 U. S. 715, 727, 729. State laws requiring segregation in the use and occupancy of privately owned property were invalidated in *Buchanan* v. *Warley*, 245 U. S. 60, and *Harmon* v. *Tyler*, 273 U. S. 668.

Among the numerous cases forbidding segregation in publicly owned but privately leased facilities, see *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *Turner* v. *Memphis*, 369 U. S. 350; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971, vacating and remanding, 202 F. 2d 275; *Derrington* v. *Plummer*, 240 F. 2d 922 (5th Cir. 1956), cert. den. *sub nom. Casey* v. *Plummer*, 353 U. S. 924.

of state power in all forms." *Shelley* v. *Kraemer*, 334 U. S. at 20. See also *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

In the *Civil Rights Cases*, 109 U. S. 3, 17, this Court held outside the Amendment's scope individual action "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" or "not sanctioned in some way the State," 109 U. S. at 17. The opinion referred to "State action of every kind" inconsistent with equal protection of the laws, *id.* at 11; to "the operation of State laws, and the action of State officers exec[illegible] or judicial," *id.* at 11. Repeatedly, the opinion held within the scope of the Fourteenth Amendment "State laws or State proceedings," *id.* at 11; "some State action," *id.* at 13; "acts done under State authority," *id.* at 13; "State action of some kind," *id.* at 13; and the opinion pointed out that "States are forbidden to legislate or act in a particular way," *id.* at 15. The Fourteenth Amendment is "addressed to counteract and afford relief against State regulations or proceedings," *id.* at 23.

Racial discriminations "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100. Certainly in this case the State is more deeply implicated in enforcing that racism so odious to our Constitution than it was in *Shelley* v. *Kraemer*. For here, the State has not merely held its courts open to suitors who would seek their aid in enforcing discrimination, but has taken an active initiative in prosecuting petitioners criminally and sentencing them to prison terms.

Moreover, petitioners here assert not merely the generalized constitutional right found in the equal protection clause of the Fourteenth Amendment to be free from racial dis-

crimination. 42 U. S. C. 1981 provides: "'All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * * .'" 42 U. S. C. 1982 provides: "'All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to * * * purchase * * * real and personal property.'" Referring to similar statutory provisions involving jury service, this Court has declared: "'For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination.'" *Fay* v. *New York*, 332 U. S. 261, 282-283.

The opinion below stresses that Kress's is "a *privately* owned corporation" and "in the conduct of its store in Durham is acting in a purely *private* capacity" (R. 77). But "private" is a word of several possible meanings. To the extent that concepts of privacy play a part in defining rights here at issue, Kress's privacy should be seen as it really is. Any suggestion that some exception to the *Shelley* rule should be made for a corporation which has sought state aid in enforcing racial discrimination in its enterprise open to the general public for profit, because somehow the inviolability of a private home may be impaired, is without merit. This prosecution is not asserted to be in aid of any interest in privacy of the property owner, for it has opened the store to the public in general. Moreover, the proprietor has not expressed *its* preference, rather it has sought state aid to enforce the custom of the community. Were a state to enforce a trespass law to protect a real interest in some private aspect of property a different

result might be required because of the importance of the right of privacy which finds firm support in the decisions of this Court. Examples where such countervailing considerations have applied are cases such as *Breard* v. *Alexandria*, 341 U. S. 622, 626, 644, and *Kovacs* v. *Cooper*, 336 U. S. 77. On the other hand a case such as *Martin* v. *Struthers*, 319 U. S. 141, is an instance where even considerations of privacy did not overcome a competing constitutional right like freedom of religion.[2] In this case the right to freedom from state imposed racial discrimination does not compete with any interests the state may have in protecting privacy.[3]

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[2] And see *Watchtower Bible and Tract Soc.* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433 (1948), in which the New York courts distinguished between the right to solicit in the streets of a large scale housing project and to go, without invitation, into the hallways to visit private apartments.

[3] To weigh considerations of privacy in a case involving racial discrimination would comport with the views of the framers of the Fourteenth Amendment. During the debate on the bill to amend the *Civil Rights Act* of 1866, 14 Stat. 27, which served as the precursor to the *Civil Rights Act* of 1875, 18 Stat. 335, Senator Sumner distinguished between a man's home and places and facilities of public accommodation licensed by law: "Each person, whether Senator or citizen, is always free to choose who shall be his friend, his associate, his guest. And does not the ancient proverb declare that a man is known by the company he keeps? But this assumes that he may choose for himself. His house is his 'castle'; and this very designation, borrowed from the common law, shows his absolute independence within its walls; * * * but when he leaves his 'castle' and goes abroad, this independence is at an end. He walks the streets; but he is subject to the prevailing law of *Equality;* nor can he appropriate the sidewalk to his own exclusive use, driving into the gutter all whose skin is less white than his own. But nobody pretends that Equality in the highway, whether on pavement or sidewalk, is a question of society. And, permit me to say that *Equality in all institutions created or regulated by law* is as little a question of society." (Emphasis added). After quoting Hollingshed, Story, Kent, and Parsons on the common law duties of innkeepers and common carriers to treat all alike, Sumner then said: 'As the inn cannot close its doors, or the public conveyance refuse a seat to any paying traveler, decent in condition, so must it

B. Certainly, at Least, the State May Not by Its Police and Courts Enforce Such Segregation When It Stems From a Community Custom of Segregation Which Has Been Generated by State Law.

Certainly, at the very least, the well established rule—that states may not enforce racial discrimination—discussed in part I, applies where the racial segregation is not a matter of private choice, but expresses deep-rooted public policy.

That segregation was a "custom of the community" (R. 22) is stated expressly in the record, although one hardly need turn there to learn a fact concerning conditions in society so well known. *Child Labor Tax Case*, 259 U. S. 20, 27 (Chief Justice Taft). Kress's manager, however, made clear that the store's segregation policy was merely that of the community.

> "It is the policy of our store to wait on customers dependent upon the customs of the community. . . . We have a stand-up counter on the first floor, and we serve Negroes and whites at that stand-up counter. We also serve white people who are accompanied by Negroes at the stand-up counter. . . . Even if Negroes accom-

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be with the theater and other places of public amusement. Here are institutions whose peculiar object is the 'pursuit of happiness,' which has been placed among the equal rights of all." Cong. Globe, 42d Cong., 2d Sess. 382-383 (1872).

It is not unreasonable that considerations of privacy should weigh so heavily. The right of privacy against intrusion on one's premises or into one's personal affairs, 4 Blackstone's Commentaries Ch. 13, §5(6) (Wendell's ed. 1850), was recognized at common law, and is recognized generally in American law. See A. L. I., Restatement of Torts, §867 (1939). This Court has recently reiterated that the due process clause protects privacy against intrusion by the States. *Mapp* v. *Ohio*, 367 U. S. 643, 654, 655; *Wolf* v. *Colorado*, 338 U. S. 25, 27-28; Cf. *Gilbert* v. *Minnesota*, 254 U. S. 325, 336 (Justice Brandeis dissenting); *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 464, 468.

panied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 16, 1960. . . . It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only" (R. 22-23).

The *Civil Rights Cases* speak of "customs having the force of law," 109 U. S. 3, 16, as a form of state action.[4] Here, as in *Garner* v. *Louisiana*, 368 U. S. 157, "segregation is basic to the structure of . . . [the state] as a community; the custom that maintains it is at least powerful as any law." (Mr. Justice Douglas concurring, at 181).[5]

But this custom of North Carolina is not separate from law. It has roots in and fills interstices of a complex network of state mandated segregation. The North Carolina Advisory Committee to the United States Commission on Civil Rights has concluded that "so long as these compulsory statutes are on the books, some private citizens are more than likely to take it upon themselves to try to enforce segregation."[6]

Most of this law was enacted about the turn of the twentieth century.[7] These state and city imposed require-

[4] See also 109 U. S. at 21: "long custom, which had the force of law . . ."

[5] This Court has recognized that "'Deeply embedded traditional ways of carrying out state policy . . .'—or not carying it out—'are often tougher and truer law than the dead words of the written text'. *Nashville C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369." *Poe* v. *Ullman*, 367 U. S. 497, 502.

[6] A discussion and presentation of this legislation may be found in North Carolina Advisory Committee to the United States Commission on Civil Rights, *Statutes and Ordinances Requiring Segregation by Race* (March 9, 1962) (mimeographed) (hereafter cited as North Carolina Advisory Committee).

[7] North Carolina Advisory Committee 23.

ments govern not only activities furnished by the state but privately-owned facilities as well. The subordinate role to which the segregation laws relegate Negroes is well illustrated by the national guard statute, N. C. Gen. Stat. §127-6: "No organization of Colored Troops shall be permitted where White troops are available, and while permitted to be organized, colored troops shall be under command of white officers."

While the state has repealed statutes requiring segregation in the public schools, school segregation continues to be enforced by other means.[8] Mental institutions,[9] orphanages,[10] and schools for the blind and deaf,[11] must be segregated as must prisons,[12] and training schools.[13]

Separate tax books must be kept for white, Negro, Indian and corporate taxpayers.[14]

State law requires racial distinctions where municipalities take possession of existing cemeteries.[15] Some city

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[8] Under the North Carolina Pupil Assignment Law "without a single exception, the boards have made initial assignment of white pupils to previously white schools and Negro children to previously Negro schools." United States Commission on Civil Rights, *The Fifty States Report* 477 (1961).

[9] G. S. 122-3-6.

[10] G. S. 116-138 to -142.

[11] G. S. 116-109, -120, -124.

[12] G. S. 148-43.

[13] G. S. 134-79 to -84; G. S. 134-84.1 to -84.9. On the various forms of segregation in health care, among patients as well as professional personnel, in public as well as private facilities, see Equal Protection of the Laws Concerning Medical Care in North Carolina, Subcommittee on Medical Care of the North Carolina Advisory Committee to the United States Commission on Civil Rights (undated) (mimeographed).

[14] G. S. 105-323.

[15] G. S. 65-37.

ordinances designate particular cemeteries for colored persons and specific burial grounds for white citizens;[16] others note simply that places of interment are to be marked for Negroes or for Caucasians.[17] Separate funeral homes must be maintained throughout the state.[18]

Municipalities also have enacted legislation requiring segregation. For example, a Charlotte ordinance, Article I, Section 5, Charlotte City Code, delineates the metes and bounds of the area within which its Negro police have authority. See North Carolina Advisory Committee to the United States Commission on Civil Rights, *op. cit. supra*, at 3. The Director of the Department of Conservation and Development, while not requiring segregation in state parks, discourages Negroes from enjoying white facilities. *Id.* at 8.

North Carolina has also undertaken extensively to regulate so-called "private" relationships. There remains on the books of North Carolina (although invalid in view of decisions of this Court, *Morgan* v. *Virginia*, 328 U. S. 373; *Gayle* v. *Browder*, 352 U. S. 903) a statute requiring racial segregation in passenger trains and steam boats. G. S. 60-94 to -97. The Utilities Commission is directed by G. S. 62-44 and G. S. 62-127.71 to require separate waiting rooms. Street cars must by statute be boarded white from the front and colored from the rear. G. S. 60-135 to -137. The Corporation Commission has been upheld in requiring enforced segregation on motor buses. *Corporation Comm'n* v. *Transportation Committee*, 198 N. C. 317, 320, 151 S. E. 648, 649 (1930). In that opinion Judge Clarkson emphasized

[16] Charlotte City Code, ch. 7, sec. 7-9, 7-56; Sec. 7-19 of the Lumberton Code; Sec. 8-1, Burlington Code.

[17] Sec. 6-42, Winston-Salem Code; Sec. 7-9, Charlotte City Code.

[18] G. S. 90-212.

that separation or segregation "has long been the settled policy" of North Carolina. See G. S. 60-139; *State* v. *Johnson*, 229 N. C. 701, 51 S. E. 2d 186 (1949).

Persons engaged in businesses employing more than two males and females must segregate on the basis of race in toilet facilities. G. S. 95-48. See G. S. 72-46 (1941). Persons operating restaurants and other food handling establishments are required to obtain a permit from the State Board of Health. G. S. 72-46. The State Board inspector's official form contains as one of the criteria on which restaurants are graded the factor of whether toilet facilities are "adequate for each sex and race." North Carolina Advisory Committee Report 18.

Fraternal orders may not be authorized to do business in North Carolina if white and colored persons are members of the same lodge. G. S. 58-267.

Marriage is forbidden between persons of the Negro and white races by the Constitution of North Carolina, Art. XIV, §8 (1868); G. S. 14-181 and G. S. 51-3.

Various statutes and ordinances throughout North Carolina require segregation in taxicabs, carnivals, other places of amusement, and restaurants. North Carolina Advisory Committee Report 15, 17-20. Among these ordinances is one of the City of Durham requiring that in public eating places where persons of the white and colored races are permitted to be served, there shall be private, separate rooms for the accommodation of each race. *Id.* at 18.[19]

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[19] The state did not rely on the ordinance at trial, nor was it adverted to on appeal. Heretofore, the North Carolina Supreme Court has declined to notice municipal ordinances not introduced into evidence at trial. See *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958).

C. Vann Woodward has written of the relative recency of the segregation system in America:

> Southerners and other Americans of middle age or even older are contemporaries of Jim Crow. They grew up along with the system. Unable to remember a time when segregation was not the general rule and practice, they have naturally assumed that things have 'always been that way.' Or if not always, then 'since slavery times,' or 'since The War,' or 'since Reconstruction.' Some even think of the system as existing along with slavery. Few have any idea of the relative recency of the Jim Crow laws, or any clear notion of how, when, and why the system arose. Woodward, The Strange Career of Jim Crow, vii-viii (1955).

Even after the end of Reconstruction and during the so-called period of "Redemption" beginning around 1877, the rigid segregation system characteristic of later years had not become the rule. The history of segregation makes clear that during the early years after Reconstruction Negroes were unsegregated in many public eating establishments in the South. *Id.* at 18-24. The Jim Crow or segregation system became all-pervasive some years later as a part of the aggressive racism of the 1890's and early 1900's, including Jim Crow laws passed at that time, which continued until an all-embracing segregation system had become the rule. In this way law shaped custom. *Id.* at ch. II.

Professor Woodward writes:

> At any rate, the findings of the present investigation tend to bear out the testimony of Negroes from various parts of the South, as reported by the Swedish writer Gunnar Myrdal, to the effect that the Jim Crow statutes were effective means of tightening and freezing—

in many cases instigating—segregation and discrimination. The evidence has indicated that under conditions prevailing in the earlier part of the period reviewed the Negro could and did do many things in the South that in the latter part of the period, under different conditions, he was prevented from doing. *Id.* at 90-91.

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It has also been seen that their [Negroes] presence on trains upon equal terms with white men was once regarded as normal, acceptable, and unobjectionable. Whether railways qualify as folkways or stateways, black man and white man once rode them together and without a partition between them. Later on the stateways apparently changed the folkways—or at any rate the railways—for the partitions and Jim Crow cars became universal. And the new seating arrangement came to seem as normal, unchangeable, and inevitable as the old ways. And so it was with the soda fountains, eating places, bars, waiting rooms, street cars, and circuses. *Id.* at 91-92.

Thus the system of segregation in places of public accommodations, has from the beginning been a product of government, politics, and law.

This Court has recognized how law may work its effect in ways other than requiring obedience to statutory text: In *Pollock v. Williams*, 322 U. S. 4, the Court discharged the petitioner on a writ of habeas corpus because a statutory presumption had induced a plea of guilty:

The State contends that we must exclude the prima facie evidence provision from consideration because in fact it played no part in producing this conviction. *Id.* at 13.

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> We cannot doubt that the presumption provision had a coercive effect in producing the plea of guilty. *Id.* at 15.

And see—*Engel* v. *Vitale*, 370 U. S. 421, 431 (indirect coercive pressure upon religious minorities). As was said in *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 463, "The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power . . . that private action takes hold." [20]

Therefore it hardly can be urged that the management was acting privately, unsanctioned by the state. Apart from state support of management's decision to segregate, that decision itself represented the policy of North Carolina induced and nourished by its laws. As Mr. Justice Douglas wrote in *Garner* v. *Louisiana*, 368 U. S. 157, 181, the proprietor's "preference does not make the action 'private,' rather than 'state,' action. If it did, a minuscule of private prejudice would convert state into private action. Moreover, where the segregation policy is the policy of a state, it matters not that the agency to enforce it is a private enterprise."

C. *A Fortiori*, the State May Not Arrest and Convict Petitioners for Having Violated a Segregation Rule Which Stems From a State Generated, Community Custom of Segregation in Premises in Which the State Is Deeply Involved Through Its Licensing and Regulatory Powers.

The nature of the State's involvement—demonstrated by extensive regulation and licensing—in the premises where

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[20] This Court has struck down state action which would enable private individuals to seek reprisals against persons opposed to racial discrimination, *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449. *A fortiori*, the link between state *requirements* of segregation and the conduct it fosters—not merely permits—should be recognized.

petitioners were arrested for violating the state-generated community custom shows even further the invalidity of the judgment below. This discrimination has been enforced in an area of public life with which the State is so intimately involved that Kress's lunch counter business is by law required to be extensively licensed and regulated. The very publicness of the enterprise is demonstrated not only by the fact that Kress serves the general public, but by the interest which the State has demonstrated in that service. In addition to the detailed regulation of business corporations (including foreign corporations)[21] North Carolina law requires various licenses,[22] imposes taxes,[23] and authorizes state and local health regulation[24] of this type of business. As Mr. Justice Douglas wrote in *Garner v. Louisiana*, 368 U. S. at 183-84:

> A state may not require segregation of the races on conventional public utilities any more than it can segregate them in ordinary public facilities. As stated by the court in Boman v Birmingham Transit Co. (CA 5 Ala) 280 F2d 531, 535, a public utility "is doing some-

[21] North Carolina General Statutes, §55-140.

[22] A state license is required for the operation of a soda fountain G. S. §55-79 or a chain store G. S. §105-98. A license is required for all establishments selling prepared food G. S. §105-62. Separate licenses are required to sell other items, such as tobacco products, G. S. §105-85 or records and radios, G. S. §105-82.

[23] Retail stores must collect sales and use taxes for the state to keep their licenses to do business (G. S. §105-164.4-6).

[24] State law establishes an overlapping pattern of health regulations for restaurants. See N. C. Gen. Laws, Ch. 130 (1957). Section 13 of this chapter authorizes each county to operate a health department; local boards of health can make rules and regulations "not inconsistent with state law," Sec. 17(b). Both the State Board of Health and the Durham County Board of Health prescribe rules applicable to food service establishments. See State Board of Health Laws, Rules and Regulations; County of Durham Sanitary Code, Sec. 1.

> thing the state deems useful for the public necessity or convenience." It was this idea that the first Mr. Justice Harlan, dissenting in Plessy v Ferguson, . . . advanced. Though a common carrier is private enterprise, "its work" he maintained is public. Id., at 554. And there can be no difference, in my view, between one kind of business that is regulated in the public interest and another kind so far as the problem of racial segregation is concerned. I do not believe that a State that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment.

In *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, this Court found sufficient governmental responsibility to require decision of a Fifth Amendment due process claim where the principal governmental involvement was a decision by a regulatory body to do nothing about private activity (radio broadcast on streetcars) it could have prohibited. The lunch counter in this case is also regulated by government, although perhaps not so closely as the streetcar company in *Pollak*. But this case has an element that the *Pollak* case did not, i.e., that government has done so much to encourage racial segregation in public life that it must share responsibility for the discriminatory rule.

And see *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U. S. 192; *Nixon* v. *Condon*, 286 U. S. 73; *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831. In each of these cases, state initiative and licensing in establishing and maintaining the enterprise led to a holding or implication that the Fifth or Fourteenth Amendments forbid racial discrimination.

Here, indeed, is a case where the State "to some significant extent" in many meaningful "manifestations has been found to have become involved. . . . " *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722.

D. No Essential Property of S. H. Kress and Co. Is Here at Issue; the Right to Make Racial Distinctions at a Single Counter in a Store Open to the Public Does Not Outweigh the High Purposes of the Fourteenth Amendment.

The highest court of North Carolina has attempted to differentiate this case from others which have refused to sanction state enforcement of racial discrimination by asserting that it was merely neutrally enforcing a "fundamental, natural, inherent and inalienable" (R. 81) private property right, allegedly " 'a sacred right, the protection of which is one of the most important objects of government' " (R. 81). Referring to the claimed right to exclude petitioners the court below held, "white people also have constitutional rights as well as Negroes, which must be protected, if our constitutional form of government is not to vanish from the face of the earth" (R. 84).

This description of the property right cannot withstand analysis. First, the court below dealt with the alleged right of the property owner to racially discriminate as if it were inviolate, when actually, states can prohibit racial discrimination in public eating places without offending any constitutionally protected property rights.[25] And though the laws violate the Fourteenth Amendment, North Carolina has hardly hesitated in *imposing* the requirement of racial

[25] See *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359; *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88; *District of Columbia* v. *John R. Thompson Co.*, 346 U. S. 100; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28; Konvitz & Leskes, A Century of Civil Rights 172-177 (1961).

segregation on private property owners.* Thus, of course, the asserted property right to treat the races as one desires on his property is very far indeed from an absolute or an inalienable right and has not even been so regarded by North Carolina. "[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U. S. 1, 22, citing *Marsh v. Alabama*, 326 U. S. 501. Indeed, the Court said in *Marsh v. Alabama*, *supra*, at 506, that constitutional control becomes greater as property is more public in its use:

> The more an owner for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Cf. Republic Aviation Corp. v. Labor Board, 324 U. S. 793, 798, 802, n. 8.

Of course, the Fourteenth Amendment does not forbid a state to assist in the enforcement of property rights as such. Indeed, for an obvious example, the state has an obligation not to engage in or assist in the invasion of the privacy of the home. Considerations of privacy, discussed in more detail, *supra*, pp. 15-16, offer one useful basis for distinguishing between permissible and impermissible types of state action.

Since "property or ownership" is, as Mr. Justice Cardozo has written, a "bundle of privileges," *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582, or as stated elsewhere, "a group or bundle of rights" given by the state, Blodgett, *Comparative Economic Systems* 24 (1944), it matters a

*See pp. 20 to 21, *supra*, citing North Carolina laws requiring segregation on private property.

great deal which of the rights or privileges constituting Kress's property was enforced in this prosecution. Various characteristics of the property interest demonstrate that this case should not depart from the general rule that states may not support racial discrimination.

The asserted property interest is but a claimed right to control the conduct and associations of others. But this claimed right is clearly separable from other incidents of ownership of the property such as fixing prices, choosing merchandise for sale, setting hours of business, selling the business or closing it down, to name but a few.

The power to regulate the conduct and associations of others has never been an unrestrained property right. Illustrations include limitations that the law has placed on those who would use their property to control the conduct of donees, as by requiring divorce or separation,[27] or with respect to marriage,[28] restrictions compelling separation of a child from its parents,[29] and requirements controlling certain personal habits.[30]

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[27] Provisions requiring divorce or separation were held void in: *Dwyer* v. *Kuchler*, 116 N. J. Eq. 426, 174 Atl. 154 (Ch. 1934); *In Re Haight's Will*, 51 App. Div. 310, 64 N. Y. S. 1029 (2d Dept. 1900); *Davidson* v. *Wilmington Trust Co.*, 23 Del. Ch. 1, 2 A. 2d 285 (Ch. 1938); *Winterland* v. *Winterland*, 389 Ill. 384, 59 N. E. 2d 661 (1945); *Hawke* v. *Euyhart*, 30 Neb. 149, 46 N. W. 422 (1890); *Cruger* v. *Phelps*, 21 Misc. 252, 47 N. Y. S. 61 (Sup. Ct. 1897).

[28] Certain marriage clauses have been held ineffective, 6 Powell, *Real Property* ¶851; A. L. I., *Restatement of Property*, §424 (1944); *Maddox* v. *Maddox, Adm'r*, 52 Va. 804 (1954).

[29] Restrictions which compel the separation of a minor child from its parent have not been viewed with favor, 6 Powell, Real Property ¶858, at 64; *In Re Carpie's Estate*, 140 Misc. 459, 250 N. Y. S. 680 (Surr. Ct. 1931); *In Re Forte's Will*, 149 Misc. 327, 267 N. Y. S. 603 (Surr. Ct. 1933); *In Re Rainey's Estate*, 161 Misc. 626, 292 N. Y. S. 476 (Surr. Ct. 1936).

[30] *Holmes* v. *Connecticut Trust & Safe Deposit Co.*, 92 Conn. 507, 103 Atl. 640 (1918) (condition that conveyee's husband abstain

The power to impose restraints on alienation has been severely limited by courts and legislatures.[31] Restrictive covenants have been limited by common law.[32] Their enforcement in courts of equity[33] and courts of law[34] has been forbidden by the Fourteenth Amendment where race was the reason for the restriction. And, of course, the rule against perpetuities is of ancient lineage.[35]

A business man is not always free to set his own prices. Fair trade acts on the one hand, approved by the Miller-Tydings Act amendment of §1 of the Sherman Act, 15 U. S. C. §1, require some businessmen to sell at fixed prices. Anti-trust concepts on the other hand, originating in the common law, *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940); *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U. S. 211 (1899), and embodied in the statutes of the United States, Robinson-Patman Act, 15 U. S. C. §13 *et seq.*; Clayton Act, 15 U. S. C. §12 *et seq.*; Sherman Anti-Trust Act, 15 U. S. C. §§1 *et seq.*, have condemned price discrimination, price fixing, and conspiracies to fix resale prices. The right to select customers

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from tobacco and liquor held void); cf. *D'Arcangelo* v. *D'Arcangelo*, 137 N. J. Eq. 63, 43 A. 2d 169 (Ch. 1945), (legatee must employ testator's brother as bus driver, at designated salary for a corporation in which legatee had received an interest; invalidated).

[31] Gray, *Restraints on the Alienation of Property* §259 (2d ed. 1895); A. L. I., *Restatement of Property*, Div. 4, Social Restrictions Imposed Upon the Creation of Property Interests 2121 (1944); Browder, *Illegal Conditions and Limitations: Miscellaneous Provisions*, 1 Okla. L. Rev. 237 (1948).

[32] *Porter* v. *Barrett*, 233 Mich. 373, 206 N. W. 532 (1925).

[33] *Shelley* v. *Kraemer*, 334 U. S. 1.

[34] *Barrows* v. *Jackson*, 346 U. S. 249.

[35] Gray, *The Rule Against Perpetuities* §201 (4th ed. 1942); 6 Powell, *Real Property*, ¶¶759, 827; Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938).

has also been curtailed by the antitrust laws,[36] as well as common law, and even the right of a single trader has been greatly limited.[37]

Numerous statutes limit property holders in their power to refuse to sell or rent on grounds of race or color[38] or to refuse to serve patrons in public accommodations on the grounds of race or color.[39] Historically, the right to select

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[36] *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, (1959). *Lorain Journal Co.* v. *U. S.*, 342 U. S. 143 (1951).

[37] *United States* v. *Colgate*, 250 U. S. 300 (1919); See *U. S.* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960); Rankin, *The Parke, Davis Case*, 1961 Antitrust Law Symposium, New York State Bar Association Section on Antitrust Law 63 (1961).

[38] Cal. Health & Safety Code §35740; Mass. G. L. c. 151B, §6 (Supp. 1961); N. J. Stat. Ann. §18:25-4 (Supp. 1961); Wash. Rev. Code §§49.60.030, 49.60.040 (1957); Cal. Civil Code, §51 (Supp. 1961); Colo. Rev. Stat. Ann. §§69-7-1, to 69-7-7 (Supp. 1960); Conn. Stat. Rev. §53-35 (Supp. 1960); Mass. Gen. L. c. 151B, §4 (Supp. 1961), as amended by Acts, 1961, c. 128; Minn. Stat. Ann. §§363.01-.13, as amended by L. 1961, c. 428 to become effective in 12/31/62; Ore. Rev. Stat. §659.033 (1959); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. Y. Executive Law, §290 (Supp. 1962); Pa. Stat. Ann., tit. 43, §953 (Supp. 1961). Cases holding some of the ordinances and statutes constitutional are: *Levitt & Sons, Inc.* v. *Division Against Discrimination*, 31 N. J. 514, 158 A. 2d 177 (1960); *Mass. Comm'n Against Discrimination* v. *Colangelo*, 30 U. S. L. W. 2608 (Mass. 1962); *State Comm'n Against Discrimination* v. *Pelham Hall Apartments*, 10 Misc. 2d 334, 170 N. Y. S. 2d 750 (Sup. Ct. 1958).

[39] Cal. Civil Code, §§51-52 (Supp. 1961); Colo. Rev. Stat. Ann. 25—1—1 *et seq.* (1953); Conn. Gen. Stat. Rev. §53-35 (Supp. 1961); D. C. Code §47-2901 *et seq.* (Supp. 1960); Indiana Stat. Ann. §§10-901, 10-902 (Supp. 1962); Iowa Code Ann. §735.1 (1950); Kansas Gen. Stat. Ann. §21-2424 (1949); Mass. Gen. L. c. 272, §§92A, 98 (1956); Mich. Stat. Ann. §28.343 (Supp. 1959); Minn. Stat. Ann. §327.09 (1947); Mont. Rev. Codes §64-211 (Supp. 1961); Neb. Rev. Stat. §§20-101, 102 (1943); N. H. Rev. Stat. Ann. §354:1 (Supp. 1961); N. J. Stat. Ann. §§10:1-2 to 10:1-7 (1960); N. M. Stat. Ann. §§49-8-1 to 49-8-6 (Supp. 1961); N. Y. Civil Rights Law §40 (1948), Executive Law, §§292(9), 296(2) (Supp. 1962); N. D. Cent. Code, §12-22-30 (Supp. 1961);

customers has been limited by common law and statute.[40] It is well known that innkeepers and carriers do not have freedom arbitrarily to select or reject patrons. Beale, *The Law of Innkeepers and Hotels* (1906).

The foregoing limitations on the power to control the conduct and associations of others describe particular examples of the general principle that "property rights" are not "sacred" and "inalienable" in the sense that common law, statute, and constitution may not limit or shape them where they have harmful public consequences. Further examples indicate different aspects of this thoroughly settled, fundamental legal truth. Property owners have been compelled to destroy valuable cedar forests which harbored fungus threatening neighboring apple orchards,[41] to spend funds to install fire extinguishing equipment,[42] to limit the

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Ohio Rev. Code §4112.02(G) (Supp. 1961); Ore. Rev. Stat. §§30.670-.680, as amended by L. 1961 c. 247; Pa. Stat. Ann., tit. 18, §4654, as amended by Act No. 19 (1961); R. I. Gen. Laws §§11-24-1 to 11-24-6 (1956); Vt. Stat. Ann., tit. 13, §§1451, 1452 (1958); Wash. Rev. Code, §§49.60.040, 49.60.215 (1962); Wis. Stat. Ann. §924.04 (1958), as amended (Supp. 1962); Wyo. Stat. §§6-83.1, 6-83.2 (Supp. 1961).

[40] Mund, "The Right to Buy—And Its Denial to Small Business," Senate Document #32, 85th Cong., 1st Sess., Select Committee on Small Business (1957); Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135 (1914); Statute of Labourers, 25 Ed. III, Stat. 1 (1350) (no one could refuse to practice his calling to whomsoever applied). The following statutes penalized a businessman's refusal to serve all comers: (1357), 31 Ed. III, c. 10 (victualers); (1360), 35 Ed. III (fishermen); (1433), 11 Hen. VI, c. 12 (candlers); (1464), 4 Ed. IV, c. 7 (shoemakers); *Lane* v. *Cotton*, 1 Ld. Raym. 646, 655; 1 Salk. 18, 19; 12 Mod. 472, 485 ("If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies . . .").

[41] *Miller* v. *Schoene*, 276 U. S. 272 (1928).

[42] *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946).

size of billboards,[43] and to make loaves of bread a certain size.[44] Moreover, employers have been compelled to allow labor organizational activities to be conducted on their property.[45] And only recently, property holders have been forbidden to use their property in a way which would, in the course of a program of racial discrimination, intimidate their lessees in the exercise of the franchise, *United States* v. *Beaty*, 288 F. 2d 653 (6th Cir. 1961).

Other facets of the claimed property right to discriminate on the basis of race in these circumstances are clearly separable from the core of Kress's interest in its business. In addition to the fact that no privacy has been intruded upon, the asserted property right did not seek to protect the premises from use alien to their intended function. Petitioners sought only to purchase and consume food in an area provided for such activity. The asserted right to exclude expressed only a preference for racial segregation and not any objection to petitioners' demeanor or conduct. And this was not a private choice. It expressed community custom. The capricious nature of the discriminat on was highlighted by the fact that this same store served food to Negroes and to whites accompanying them if they were standing, but not if they were seated (R. 22). As in *Shelley* v. *Kraemer*, 334 U. S. 1, 10, the restriction did not limit the type of use made of the premises, nor the type of person or conduct permitted thereon except to refer to race.

Moreover, the property interest enforced below attempted only to achieve discrimination in a store thrown open by

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[43] *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935); *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269 (1919); *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526 (1917).

[44] *Schmidinger* v. *Chicago*, 226 U. S. 578.

[45] *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1955); *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793 (1945).

the owner to the general public (including Negroes) for his own business advantage (Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 506). The specific area within the store in dispute, i.e., the lunch counter, was a public part of the premises and an integral part of a single commercial establishment serving the public. Though a sign at the counter stated "Invited Guests and Employees Only" (R. 23), in practice the category of "Invited guests" was meant to include the entire white public, except whites accompanying Negroes (R. 22-23).

Consequently, the property interest enforced below is simply a claimed right to enforce racial discrimination in very particular circumstances. It obviously is not true that refusal to enforce this asserted incident of ownership destroys the whole bundle of rights. That result would be contrary to the entire genius or our jurisprudence.

The premise that Kress owns the property does not lead to the ultimate logical extreme that it may absolutely control the conduct and associations of others in the store.

Mr. Justice Holmes has written that "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 345, 355. Only last term, Mr. Justice Frankfurter, dissenting, pointed out the indubitable truth that "An end of discrimination against the Negro was the compelling motive of the Civil War Amendments. The Fifteenth expresses this in terms and it is no less true of the Equal Protection Clause of the Fourteenth." *Baker* v. *Carr*, 369 U. S. 186, 285-86. In the case at bar Kress's property is limited by the Fourteenth Amendment

and does not reach the constitutionally untenable logical extreme that the states may aid the store in upholding racism. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

E. In Any Event the Convictions Below Must Fall When, in Addition to the Foregoing, North Carolina Has Failed to Protect Negro Citizens in the Right to Equal Access to Public Accommodations.

Here, however, we have more than the elements set forth above—State arrest, conviction and prison term; implementation of a community custom of racial segregation generated by state law; enforcement of an odious property right of minor consequence to the owner; elaborate state initiative and involvement in establishment and maintenance of the enterprise. Here the State has failed to provide what the *Civil Rights Cases* assumed the States did provide: "a right to enjoy equal accommodation and privileges," which this Court termed "one of the essential rights of the citizen which no state can interfere with." 109 U. S. at 19.

This Court has recognized that States' failure or refusal to act can deny the equal protection of the laws. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725; *Terry* v. *Adams*, 345 U. S. 461, 469; *Truax* v. *Corrigan*, 257 U. S. 312; see *Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951); *Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943).

Indeed, it is questionable whether the verbal concept of "state action" in equal protection cases rests on more than a misunderstanding,[46] for the phrase, no state shall deny

[46] See, generally Mr. Justice Harlan dissenting in *Civil Rights Cases*, 109 U. S. 3, 26-62.

equal protection refers even more naturally to state inaction than to state action.

Mr. Justice Woods, a member of the majority in the *Civil Rights Cases*, stated in *United States* v. *Hall*, 26 Fed. Cas. 79, 81 (No. 15,282 1871):

> Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection.

His concurrence with the majority in the *Civil Rights Cases* may, therefore, be explained by his agreement with their assumption that remedies against the discrimination in those cases existed under state law.

This indeed was a view held by some of the legislators concerned with the scope of the Amendment at or around the time of its passage. For example, Representative Wilson of Indiana in debates on the Enforcement Act of April 20, 1871, 17 Stat. 13, argued that the states were under an obligation to assure equality and that failure to do so was a denial of equal protection:

1. The provisions 'no State shall deny' and 'Congress shall have power to enforce' mean that equal protection shall be provided for all persons.
2. *That a failure to enact the proper laws for that purpose, or a failure to enforce them,* is a denial of equal protection. (Emphasis added.)
3. That when there is such a denial Congress may enact laws to secure equal protection.[47]

[47] Cong. Globe, 42nd Congress, 1st Sess. 483 (1871).

Representative Lawrence in debates on the Civil Rights Act of 1875 stated:

> What the State permits by its sanction, having the power to prohibit, it does in effect itself.[48]

Senator Pool in debates on the Enforcement Act of May 31, 1870, 16 Stat. 140, argued that:

> . . . but to say that it shall not deny to any person the equal protection of the law it seems to me opens up a different branch of the subject. *It shall not deny by acts of omission*, by a failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights.[49] (Emphasis added.)

This view is endorsed by the opinion in the *Civil Rights Cases*, for that decision was based on the assumption that the states in question would provide remedies securing to their citizens the right of access to places of public accommodation without racial discrimination:

> We have discussed the question presented by the law on the assumption *that a right to enjoy equal accommodations* and privileges in all inns, public conveyances, and places of public amusement, *is one of*

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[48] Cong. Rec., 43d Cong., 1st Sess. 412 (1874).

[49] Cong. Globe, 41st Cong., 2d Sess. 3611 (1870).
Other contemporary congressmen also suggested that state inaction may be as culpable as action: In a speech delivered by Representative Bingham of Ohio, the framer of the key phrases in Section One, it was repeatedly stated that the Fourteenth Amendment granted Congress the power to act on individuals and could provide relief against the denial of rights by the states whether by "acts of omission or commission." Appendix to the Cong. Globe, 42d Congress, 1st Sess. 85. Representative Coburn of Indiana said that a state could deny equal protection by failing to punish individuals violating the rights of others. Cong. Globe, 42d Congress, 1st Sess. 459.

the essential rights of the citizen which no state can abridge or interfere with (109 U. S. at 19). (Emphasis added.)

* * * * *

Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and *presumably subject to redress by those laws until the contrary appears?* (109 U. S. at 24). (Emphasis added.)

Mr. Justice Bradley's entire opinion was concerned with the question whether the Fourteenth Amendment had conferred on Congress the power to regulate the acts of private individuals when, as he presumed, the States were exercising their responsibilities toward the goal of eliminating racial discrimination. While he concluded in the negative, it is extremely doubtful that the result would have been the same if a state had been found to be in effect sanctioning private discrimination by laxity in this regard. See Konvitz & Leskes, A Century of Civil Rights 150 (1961); Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Q. 375, 376; Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 Colum. L. Rev. 149, 184 (1935); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 21 (1959).

This case, therefore, is like *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725:

[T]he Authority could have affirmatively required Eagle to discharge the responsibilities under the Four-

> teenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction . . . the State . . . has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

For here in an area in which the State is deeply involved it has both positively and negatively sanctioned the racial segregation which gave rise to this case.

II.

The Criminal Statute Applied to Convict Petitioners Gave No Fair and Effective Warning That Their Actions Were Prohibited: Petitioners' Conduct Violated No Standard Required by the Plain Language of the Law; Thereby Their Conviction Offends the Due Process Clause of the Fourteenth Amendment and Conflicts With Principles Announced by This Court.

Petitioners were convicted under North Carolina General Statute, §14-134, which provides:

> If any person after being forbidden to do so, shall go or enter upon the lands of another without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be fined not exceeding fifty dollars, or imprisoned not more than thirty days.

Although the statute in terms prohibits only going on the land of another *after* being forbidden to do so, the Supreme Court of North Carolina has now construed the statute to

prohibit also remaining on property when directed to leave following lawful entry (R. 82). Stated another way, the statute now is applied as if "remain" were substituted for "enter." Expansive judicial interpretation of the statute began by a statement in *State* v. *Clyburn*, 247 N. C. 455, 101 S. E. 2d 295 (1958) (a case in which defendants deliberately ignored racial signs posted outside an ice cream parlor and also refused to leave upon demand),[50] 92 years after enactment of the law.[51]

The instant case is the first unambiguous holding under §14-134 which convicts defendants who went upon property with permission and merely refused to leave when directed.

Without a doubt petitioners and all Negroes were welcome within the store—apart from the basement lunch counter. The arresting officer stated that, "The only crime committed in my presence, as I saw it, was their failure and refusal to leave when they were ordered to do so by the manager" (R. 26). There were no discriminatory signs outside the store (R. 23). No sign forbade Negroes and white persons who accompany Negroes to sit at the lunch counter; the sign said merely "Invited Guests and Employees Only" (R. 23). Whatever petitioners' knowledge of the store's racial policy as it had been practiced, there was no suggestion that they

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[50] In the *Clyburn* opinion, and here, the State Court explained construction of §14-134 by reference to analogous construction of a statute prohibiting forcible entry and detainer (N. C. Gen. Stat. §14-126), which had been construed to apply to peaceful entry followed by forcible opposition to a later demand to leave. The court held that "entry" was synonymous with "trespass" in both statutes (§14-126 and §14-234). (§14-134 does not use the word "entry"; it states "go or enter upon.")

The facts of the *Clyburn* case are summarized in the opinion below in this case (R. 79).

[51] The Statute was first enacted in 1866. North Carolina Laws, Special Session, Jan., 1866, C. 60.

had ever been forbidden to go to the lunch counter and request service. The Court's conclusory statement that defendants "entered" (trespassed) "after having been forbidden to do so" (R. 88), was simply a holding that defendants' acts in failing to leave when directed violated the statute.

Absent the special expansive interpretation given §14-134 by the North Carolina Supreme Court, the case would plainly fall within the principle of *Thompson* v. *City of Louisville*, 362 U. S. 199, and would be a denial of due process of law as a conviction resting upon no evidence of guilt. There was obviously no evidence that petitioners entered the premises "after having been forbidden to do so," and the conclusion that they did rests solely upon the special construction of the law.

The due process clause of the Fourteenth Amendment requires that criminal statutes be sufficiently express to inform those who are subject to them what conduct on their part will render them criminally liable. "All are entitled to be informed as to what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

The basic function of the proscription against "vagueness" is to ensure that a defendant at the time of his acts is sufficiently apprised by the state law that these acts are forbidden. The whole thrust of the doctrine, therefore, concerns a right to fair warning at a time prior to the state court's interpretation of the statute under which the prosecution was had. There must, therefore, be some limits set to the range permitted to construction if the right to fair warning is not to be seriously curtailed. Judicial construction often has been permitted to cure criminal statutes of the vice of vagueness, but these have been constructions which confine, not expand, statutory language. Cf. *Chaplinsky* v.

New Hampshire, 315 U. S. 568, with *Herndon* v. *Lowry*, 301 U. S. 242. The more the construction expands a statute and varies from what is reasonably predictable by the plain words, the more it should be open to a charge of vagueness in the application. In its present posture, the trespass statute has been so judicially expanded that it could not have given fair and effective warning of the acts it now prohibits. Rather by expansive interpretation the statute now reaches more than its words fairly and effectively define. This Court, by adjudging the construction vague in the application does not usurp the function of the state court as the ultimate arbiter of the meaning of state statutes. It merely prevents an *ad hoc* statement of the posture of state law from acting to deprive the defendants of fair notice required by the due process clause of the Fourteenth Amendment. This Court has in the past exercised such residual control over construction of state law which unreasonably threatened defendants with a loss of their constitutional rights. *N. A. A. C. P.* v. *Alabama, ex rel. Patterson*, 357 U. S. 449; *Staub* v. *Baxley*, 355 U. S. 313.

Construing and applying federal statutes this Court has long adhered to the principle expressed in *Pierce* v. *United States*, 314 U. S. 306, 311:

> . . . judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness. Cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451, and cases cited.

In *Pierce, supra*, the Court held a statute forbidding false personation of an officer or employee of the United States inapplicable to one who had impersonated an officer of the T. V. A. Similarly, in *United States* v. *Cardiff*, 344 U. S. 174, this Court held too vague for judicial enforcement a

criminal provision of the Federal Food, Drug, and Cosmetic Act which made criminal a refusal to permit entry or inspection of business premises "as authorized by" another provision which, in turn, authorized certain officers to enter and inspect "after first making request and obtaining permission of the owner." The Court said in *Cardiff*, at 344 U. S. 174, 176-177:

> The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. Cf. *Herndon* v. *Lowry*, 301 U. S. 242.

The Court applied similar principles in *McBoyle* v. *United States*, 283 U. S. 25, 27; *United States* v. *Weitzel*, 246 U. S. 533, 543, and *United States* v. *Wiltberger*, 18 U. S. (5 Wheat.) 76, 96. Through these cases runs a uniform application of the rule expressed by Chief Justice Marshall:

> It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated (Id. 18 U. S. (5 Wheat.) at 96).

The cases discussed above involved federal statutes concerning which this Court applied a rule of construction closely akin to the constitutionally required rule of fair and

effective notice. This close relationship is indicated by the references to cases decided on constitutional grounds. The *Pierce* opinion cited for comparison *Lanzetta* v. *New Jersey, supra,* and "cases cited therein," while *Cardiff* mentions *United States* v. *L. Cohen Grocery Co., supra,* and *Herndon* v. *Lowry, supra.*

On its face the North Carolina trespass statute warns against a single act, i.e., going or entering upon the land of another "after" being forbidden to do so. "After" connotes a sequence of events which by definition excludes going on or entering property "before" being forbidden. The sense of the statute in normal usage negates its applicability to petitioners' act of going on the premises with permission and later failing to leave when directed.

But by judicial interpretation "enter" was held synonymous with "trespass," and, in effect, also with "remain." Here a legislative *casus omissus* was corrected by the court. But as Mr. Justice Brandeis observed in *United States* v. *Weitzel, supra* at 543, a *casus omissus* while not unusual, and often undiscovered until much time has elapsed, does not justify extension of criminal laws by reference to legislative intent.

Moreover, that the indictments specified both that petitioners had entered after having been forbidden and also that they refused to leave after being ordered to do so, does not correct the unfairness inherent in the statute's failure specifically to define a refusal to leave as an offense. As this Court said in *Lanzetta* v. *New Jersey, supra*:

> It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See *Stromberg* v. *California,* 283 U. S. 359, 368; *Lovell* v. *Griffin,* 303 U. S. 444.

Petitioners do not contend for an unreasonable degree of specificity in legislative drafting. Some state trespass laws have specifically recognized as distinct prohibited acts the act of going upon property after being forbidden and the act of remaining when directed to leave.[52]

Converting by judicial construction the common English word "enter" into a word of art meaning "trespass" or "remain," has transformed the statute from one which fairly warns against one act into a law which fails to apprise those subject to it "in language that the common word will understand, of what the law intends to do if a certain line is passed" (*McBoyle* v. *United States*, 283 U. S. 27). Nor does common-law usage of the word "enter" support the proposition that it is synonymous with "trespass" or "remaining." While "enter" in the sense of going on and taking possession of land is familiar (Ballantine, "Law Dictionary" 436 (2d Ed. 1948), "Black's Law Dictionary" (4th Ed. 1951), 625), its use to mean "remaining on land and refusing to leave it when ordered off" is novel.

It must be noted, too, that petitioners' request for service was part of a protest against racial discrimination and as

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[52] See for example the following state statutes which do effectively differentiate between "entry" after being forbidden and "remaining" after being forbidden. The wording of the statutes varies but all of them effectively distinguish between the situation where a person has gone on property after being forbidden to do so, and the situation where a person is already on property and refuses to depart after being directed to do so, and provide separately for both situations: Code of Ala., Title 14, §426; Compiled Laws of Alaska Ann. 1958, Cum. Supp. Vol. III, §65-5-112; Arkansas Code, §71-1803; Gen. Stat. of Conn. (1958 Rev.), §53-103; D. C. Code §22-3102 (Supp. VII, 1956); Florida Code, §821.01; Rev. Code of Hawaii, §312-1; Illinois Code, §38-565; Indiana Code, §10-4506; Mass. Code Ann. C. 266, §120; Michigan Statutes Ann. 1954, Vol. 25, §28.820(1); Minnesota Statutes Ann. 1947, Vol. 40, §621.57; Mississippi Code §2411; Nevada Code, §207.200; Ohio Code, §2909.21; Oregon Code, §164.460; Code of Virginia, 1960 Replacement Volume, §18.1-173; Wyoming Code, §6-226.

such an exercise of free speech. This Court has in many instances held a statute more amenable to an attack of vagueness where its construction creates a danger of encroachment on the right of free speech and threatens to deter its legitimate exercise. *Saia* v. *New York*, 334 U. S. 558; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Kunz* v. *New York*, 340 U. S. 290. To avoid an undue restriction on free speech, where it is an incident of conduct, the statute must clearly define the prohibited activity; consequently, the scope of construction must have less latitude. An interpretation completely unpredictable by the plain language of the statute, which is used to bring petitioners' protest within the ambit of prohibited conduct cannot but have such an "inhibiting effect on speech." *Smith* v. *California*, 361 U. S. 147, 151.

As construed and applied, the law in question no longer informs one what is forbidden in fair terms, and no longer warns against transgression. This failure offends the standard of fairness expressed by the rule against expansive construction of criminal laws and embodied in the due process clause of the Fourteenth Amendment.

III.

The Decision Below Conflicts With Decisions of This Court Securing the Fourteenth Amendment Right to Freedom of Expression.

Petitioners were engaged in the exercise of free expression by means of verbal requests to the management and the requests implicit in seating themselves at the counter for nonsegregated lunch counter service. Their expression (asking for service) was entirely appropriate to the time and place in which it occurred. Certainly the invitation to enter an establishment carries with it the right to discuss and even argue with the proprietor concerning terms and conditions of service so long as no disorder or obstruction of business occurs.

Petitioners did not shout, obstruct business, carry picketing signs, give out handbills, or engage in any conduct inappropriate to the time, place and circumstances. And, as is fully elaborated above, *supra*, pp. 15-16, there was no invasion of privacy involved in this case, since the lunch counter was an integral part of commercial property open up to the public.

This Court and other courts on numerous occasions have held that the right of free speech is not circumscribed by the mere fact that it occurs on private property. The existence of a property interest is but one circumstance to be considered among many. In *Marsh* v. *Alabama*, *supra*, for example, this Court overturned the trespass conviction of Jehovah's Witnesses who went upon the premises of a company town to proselytize holding that such arrest and conviction violated the Fourteenth Amendment. In *Republic Aviation Corp.* v. *National Labor Relations Board*,

324 U. S. 793, the Court upheld the validity of the National Labor Relations Board's ruling that lacking special circumstances that might make such rules necessary, employer regulations forbidding all union solicitation on company property regardless of whether the workers were on their own or company time, constituted unfair labor practices.[53]

In *Martin* v. *Struthers*, 319 U. S. 141, this Court held unconstitutional an ordinance which made unlawful ringing doorbells of residences for the purpose of distributing handbills, upon considering the free speech values involved—"[d]oor to door distribution of circulars is essential to the poorly financed causes of little people," at p. 146—and that the ordinance precluded individual private householders from deciding whether they desired to receive the message. But effecting "an adjustment of constitutional rights in the light of the particular living conditions of the time and place", *Breard* v. *Alexandria*, 341 U. S. 622, 626, the Court, assessing a conviction for door-to-door commercial solicitation of magazines, contrary to a "Green River" ordinance, concluded that the community "speak[ing] for the citizens," 341 U. S. 644, might convict for crime in the nature of trespass after balancing the "conveniences be-

[53] See also *N.L.R.B.* v. *American Pearl Button Co.*, 149 F. 2d 258 (8th Cir., 1945); *United Steelworkers* v. *N. L. R. B.*, 243 F. 2d 593, 598 (D. C. Cir., 1956) (reversed on other grounds) 357 U. S. 357. ("Our attention has not been called to any case under the Wagner Act or its successor in which it has been held that an employer can prohibit either solicitation or distribution of literature by employees simply because the premises are company property.

Employees are lawfully within the plant, and nonworking time is their own time. If Section 7 activities are to be prohibited, something more than mere ownership and control must be shown.")

Compare *N.L.R.B.* v. *Fansteel Metal Corp.*, 306 U. S. 240, 252 (employees seized plant; discharge held valid: "high-handed proceeding without shadow of legal right").

tween some householders' desire for privacy and the publisher's right to distribute publications in the precise way that those soliciting for him think brings the best results." 341 U. S. at 644. Because, among other things, "[s]ubscription may be made by anyone interested in receiving the magazines without the annoyances of house to house canvassing," *ibid.*, the judgment was affirmed.

Similarly, following an appraisal of the speech and property considerations involved, a Baltimore City Court, *State of Maryland* v. *Williams*, 44 Lab. Rel. Ref. Man. 2357, 2361 (1959), has on Fourteenth Amendment and Labor Management Relations Act grounds, decided that pickets may patrol property within a privately owned shopping center. See also *People* v. *Barisi*, 193 Misc. 934, 86 N. Y. S. 2d 277, 279 (1948), which held that picketing within Pennsylvania Station was not trespass; the owners opened it to the public and their property rights were "circumscribed by the constitutional rights of those who use it"; *Freeman* v. *Retail Clerks Union*, Washington Superior Court, 45 Lab. Rel. Ref. Man. 2334 (1959), which denied relief to a shopping center owner against picketers on his property, relying on the Fourteenth Amendment.

The liberty secured by the due process clause of the Fourteenth Amendment insofar as it protects free expression is not limited to verbal utterances, though petitioners here expressed themselves by speech. The right comprehends picketing; *Thornhill* v. *Alabama*, 310 U. S. 88; free distribution of handbills, *Martin* v. *Struthers*, 319 U. S. 141; display of motion pictures, *Burstyn* v. *Wilson*, 343 U. S. 495; joining of associations, *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449; the display of a flag or symbol, *Stromberg* v. *California*, 283 U. S. 359. What has become known as a "sit in" is a different but obviously well understood symbol, a meaningful method of communication and protest.

In the circumstances of this case, the only apparent state interest being preserved was that of maintaining the management's right to exclude Negroes from the lunch counter. The management itself sought nothing more. But as Justice Holmes held in *Schenck* v. *United States*, 249 U. S. 47, 52, the question is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evil" that the state has a right to prevent.

The state has no interest in preserving such discrimination and certainly has no valid interest in suppressing speech which is entirely appropriate to the time and place and does not interfere with privacy, when the speech urges an end to racial discrimination imposed in accordance with the customs of the community.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

Respectfully submitted,

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